

Book Review

Strategies of Abolition

Capital Punishment: The Inevitability of Caprice and Mistake. By Charles L. Black, Jr. New York: W.W. Norton & Co., Inc., 1974. Pp. 96. \$5.95. \$1.95 (paperbound).

This is a book, I might say a letter, written to four men: those Justices who, having expressed reservations about capital punishment, have yet held themselves unwilling to override with their own preferences those legislative choices which provide for the death penalty. Absent the freakish imposition of the death penalty, which set the historical context of *Furman v. Georgia*,¹ no widely held legal theory² has brought capital punishment within the meaning of Eighth Amendment³ prohibitions. Without a theory directing us to a similar constitutional bar, those four Justices cannot both respect the political processes of the states and strike down capital punishment generally. The argument in this book provides the Court with just such a theory.

Yet I believe that the book is mainly written for the American citizenry. People are aware and opinioned of death and power; probably no adult in this country is without a rough sense of what it means for the state to take life. The public seems to demand more convincing reasons for the countermanding of its elected legislators than mere speculation about the sensibilities of enlightened groups, or arguments which must deduce equal protection violations from the raw data of racial ratios on death row.⁴ Though telling and not lightly dismissed, such arguments lack the broad intuitive appeal on which constitutional action by the Court is best grounded. The carefully wrought concurrences in *Furman*, turning on standardless "discretion,"⁵ were perhaps too intricate; their arguments, as reported across the country, must have appeared to confirm that most insidious truism,

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *But see id.* at 270, 305 (Brennan, J., concurring); at 358-59 (Marshall, J., concurring).

3. U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. *Furman v. Georgia*, 408 U.S. 238, 362-63 (1972) (Marshall, J., concurring); *id.* at 249-52 (Douglas, J., concurring).

5. *Id.* at 257 (Douglas, J., concurring); *id.* at 291-300 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 311-14 (White, J., concurring); *id.* at 363-68 (Marshall, J., concurring).

that constitutional doctrine is just a matter of opinion. Certainly the variety of confusions evidenced in subsequent legislative action indicates this. "Cruel & Unusual" are familiar terms; arguments arriving at them must go by familiar routes.

Professor Black's book, by contrast, is an essay of appeal to the sensible, rather than to sensibility. The prose style is bluntly plain and many an intricate argument is discarded lest it detract from the cumulative force of the thesis. Because the thesis itself rests on a relentness appeal to common sense and generally held views, *Capital Punishment* is an explanation now in search of a decision.

The principal thesis is a statement about Due Process: "the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures both of arbitrariness and of mistake."⁶ The force of this conclusion is apparent only when one realizes that such mistake and standardless decisionmaking are made intolerable by the capital context and that traditional justifications for the death penalty simply do not recognize the significance of these shortcomings.

The character of 'mistake' seems obvious. An eyewitness may be mistaken as to the identity of a murderer; a jury may be mistaken in believing the witness. It is somewhat more problematic, but certainly sensible, to say that a jury may be mistaken in deciding whether the defendant "intentionally or knowingly caused the death of an individual." But at some point, the possibility of error yields to the certainty of arbitrariness; in no meaningful sense can a jury be "mistaken" or "correct" as to whether, beyond a reasonable doubt, "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Yet this is a question which, if answered affirmatively, triggers a capital penalty under the new Texas statute.⁷ The errors of mistake and caprice have a reciprocal relationship.

As a purported "test" becomes less and less intelligible, and hence more and more a cloak for arbitrariness, "mistake" becomes less and less possible—not . . . because of any certainty of one's being right, but for the exactly contrary reason that there is no "right" or "wrong" discernible.⁸

6. C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 24 (1974) [hereinafter cited by page number only].

7. TEX. CODE CRIM. PRO. art. 37.071(b)(2) (1973).

8. P. 20.

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Caprice need not be whimsical; it may be the earnest result of what we do when we don't quite know how to follow the rules by which we are to decide.

Ignoring the common analyses which treat only the *uses* of punishment and then attach the capital exponent, as it were, Black looks instead at the *process* of all punishment decisions and shows how it is tintured dramatically in the capital context.

Black discusses each punishment decision in turn: the prosecutor's decision whether to charge and what conditions to offer in return for a guilty plea; the jury's decisions of physical and psychological facts; the different mechanisms of judicial and executive review. Most of us are aware of the slippage at each of these locks; we were probably not aware of the peculiar kind of error that occurs when it is a capital charge that the prosecutor chooses, a capital penalty that the defendant's plea avoids.

Professor Black dwells only briefly on the opportunity for mistake and arbitrariness in the prosecutorial decision to charge an offense. He reminds us of situations where there is no subsequent chance to mitigate an imprudent selection of the charge, *viz.*, the new mandatory death penalty statutes. Many cases will occur which fall within the statutory language but which hardly could be seen as deserving of death.

If a bill in a certain state, for example, becomes law, death by hanging will be *mandatory* for one who "*recklessly* causes the death of a law enforcement officer, Corrections employee or fireman while such officer is in the lawful performance of his duties. . . ." Is it necessary to construct an elaborate hypothetical case to convince anybody that the killing of a policeman, in line of duty, not by intention but merely "*recklessly*," might sometimes occur in such a way that it would be simply absurd, as well as incredibly cruel, to *hang* the "*reckless*" person?⁹

The prosecutor may well be making the capital decision prior to trial; he or she will have to decide, absent any legal guidelines, whether to press forward to tragic conclusion or, arbitrarily, to exercise mercy. The prosecutor's decision to accept or refuse a noncapital plea is the single most significant choice separating out those who otherwise would have faced the death penalty; it is made without any adjudication of guilt or innocence whatever.

The defendant's role in the plea bargaining process also is trans-

9. P. 39 (emphasis in original).

formed by the omnipresence of a possible capital charge. In this situation, unlike any of the other punishment possibilities, the prosecutor is given "a counter of something like infinite weight" which skews the entire process. Some have suggested that innocent clients *should* plead guilty rather than face the possibility of a death sentence reviewable only as to legal questions; one cannot help but speculate on the effect of such cynicism if the death penalty is truly revived and begins to operate once again.

Furman recognized that juries were sentencing some men to die and leaving others for prison on the basis of little more than chance and prejudice; indeed, how could this be otherwise when charges to the jury are notoriously and necessarily opaque in capital situations? It is not that juries make mistakes as to findings of physical fact (although in the case of an executed defendant there is an irretrievability to these findings quite distinct from time lost in prison waiting for the truth to come to light). Rather, in the capital context, it is that the jury must decide, given a set of facts that might support a conclusion either way, whether the defendant is to be convicted of an offense that carries a death penalty or instead of a "lesser included offense." Typically this will be a decision as to the state of mind of the defendant in the period preceding the death of the victim and the decision will turn on the jurors' understanding of terms such as 'premeditation,' 'intent' and 'deliberateness.' We usually tolerate the rough justice such distinctions impose in the criminal justice process—it is in part the source of the justified pride we take in the jury system—because we are aware of the scant utility of judgment by rote. In the situation of a capital penalty, however, this means that some people will be sent to die without anyone being able to say clearly why it is *they* who are dying. The ultimate character of death should, alone, account for the contrast of our horror at this prospect with our tolerance of similar ineffable decisionmaking when the penalties are fines or imprisonment.

This is brought into high relief by a consideration of the insanity defense. If the notion of exculpatory insanity means anything, then it is possible that a jury will make a mistake in evaluating it. It may be, given the present state of the art, that such mistakes are even likely.¹⁰ What seems more plausible is that we really haven't any idea how to judge whether someone was, at some past time, insane in a way that the law should recognize as exculpatory. To choose citizens for execution on the basis of such irrational judgments is very dif-

10. See A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

ferent from sending a man to a prison. As Black reminds us, a decision as to the sanity of the defendant ceases to be a problem of prudent management (should this person go to this or that kind of institution) when we confront the death penalty case.

Turn to the sentencing stage. Again the thesis would hold that the frequency of mistake grows higher as the rules of decision grow dimmer, until mistake is replaced by unguided discretion. The two typical legislative responses to *Furman* in states that subsequently have passed capital punishment statutes are the two-stage hearing and the mandatory penalty. Professor Black's parsing of two such statutes, those of Texas¹¹ and Georgia,¹² provides grim comedy and is the single most convincing demonstration of his accusation of standardlessness. With this analysis he neatly completes his turn: having discovered with *Furman* that ruleless discretion could not suffice for capital judgments, we must now discover something we have known in the rest of the law for some time—that statutory language cannot possibly replace such discretion. Either standardlessness will be pushed to another stage or juries will be called upon to apply standards vague enough to repeat the *Furman* case. This fact suggests that some dissenting Justices in *Furman*, applying it *stare decisis*, should feel bound to strike down any future death penalty.

Capital Punishment has an even easier time establishing its perspective in discussing executive clemency. Of course there are no standards; we have the testimony of governors of every state to confirm this. What Black adds is a novel jurisprudential argument about mistake of law. If a judge can be right or wrong about a question of law, as evidenced by divided courts and reversed appeals, then at times a lack of money to adequately press an appeal will send a man to a death that the law did not prescribe for him. Alternatively, if law is seen as the process by which a judge's values, political sense, and notions of justice coalesce to precipitate a decision, the surety of standardlessness is established. The system to which we have dedicated our professional lives is not good enough to choose which people shall be executed for their crimes. Those corrections or changes in law which represent the development of an ongoing system can be of no saving grace to a process that has put someone beyond its reach.

The Traditional Structure of the Question

Typically, analyses of capital punishment begin with two questions about purpose: Is retribution a constitutionally permissible basis for

11. TEX. CODE CRIM. PRO. art. 37.071 (1973).

12. GA. CODE § 27-2534.1 (1973).

the death penalty? Does the death penalty actually deter criminal behavior? Since the Constitution explicitly forbids only a certain class of retributive justice (ex post facto laws and bills of attainder,¹³ for example), the retribution issue usually dissolves into a division of comments about moral sensitivities and the restraint necessary to allow legislatures to punish for the heuristic value of the act.

If the Constitution is of little explicit help in determining the permissibility of retribution as a purpose, it is similarly modest in the case of deterrence. Deterrence as a constitutionally allowable ground for punishment has not generally been questioned. The empirical efficacy of punishment as a deterrent might have constitutional implications if it could be shown conclusively that higher penalties had no value whatsoever to deter a crime. But the social sciences have given us, and are likely to give us, no such certainty.¹⁴ With good judgment, Professor Black's book doesn't bother much with the debate, except to remind us most importantly of the capital context in which the purposes of punishment are to be effected. The question of deterrence is not one of absolute value, but of whether the death penalty deters a great deal better than life imprisonment. Given the thesis of *Capital Punishment*, the question becomes: 'If the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures of arbitrariness and mistake, does the execution of citizens, some for the wrong reason, some wrongly, and some for no reason at all, deter other citizens sufficiently better than long imprisonment?'

The issue of retribution similarly may be restated in this context. 'Is vengeance so indispensable a good that we should continue the capital penalty knowing that it is sometimes invoked irrationally and sometimes mistakenly, and sometimes arbitrarily forborne (even with the so-called mandatory statutes), with equally little justification?'

Due Process and Death

If our legal process is so clearly insufficient to that which is due in prescribing death, why hasn't this argument been made before?

13. U.S. CONST. art. I, § 9, cl. 3.

14. Naturally one can think of examples in which the possibility of the death penalty would deter crime and even death itself. Imagine the frightened thief who holds a hostage.

Arguing that the death penalty is a greater punishment, one must acknowledge that there will be times when the same intuitive horror will be operating in the criminal's mind. Yet the argument that penalties or practices are justified by their beneficial impact is not a constitutional argument; the whole point of erecting constitutional prohibitions is just to prevent the use of certain means when it seems to most people that some end excuses that use.

There are three likely reasons. First, we have more insight into the criminal process, and most particularly the insanity defense, than ever before. The bar generally is more aware of practices like plea bargaining. This process of understanding makes some sorts of legal arguments live ones. Second, Charles Black has wrought a brilliant argument. Like other intellectual creations it comes together inexplicably. Third, and most important, is the muddy history of due process during our century. The clause has had bad flavor for us. Only recently have we been able to begin forgetting quarrels that obscured the very concept of due process.

The argument of *Capital Punishment* turns on the idea that we can, and should, have higher standards of due process for the deprivation of life than for deprivation of liberty or property. Black convincingly argues that these higher standards of clarity and certainty cannot be met by our criminal justice system. Must they be?

Black notes that the culture recognizes death as a higher penalty:¹⁵ in this he is perhaps replying to Jacques Barzun's argument that imprisonment is a greater deprivation.¹⁶ In any event, it can be demonstrated that the law has recognized this priority. Requiring jury unanimity in capital cases, limiting pleas of guilty to a capital offense,¹⁷ providing systems of automatic appeal,¹⁸ all these safeguards have been provided by various states absent the compulsion of the Supreme Court. As a constitutional requirement, *Powell v. Alabama*,¹⁹ although since expanded by *Gideon v. Wainwright*,²⁰ demanded a procedural awareness of the priority of the capital penalty. One cannot escape, therefore, the force of the argument by saying that it equally indicts all punishment. That would ignore that it is the capital premise that transforms the use of discretion in the criminal system.²¹ The late

15. Black points out that "commutation," for example, is always from the death penalty to imprisonment and suggests that the general community would be shocked were an executive to exercise this power the other way round. P. 31.

16. Barzun, *In Favor of Capital Punishment*, AM. SCHOLAR, Spring 1962, at 181, 188-91.

17. E.g., N.Y. CRIM. PRO. LAW § 220.10(6)(c) (McKinney Supp. 1974).

18. E.g., CAL. PENAL CODE § 1239(b) (West 1970).

19. 287 U.S. 45 (1932). In *Powell*, the fact that the defendants "stood in deadly peril of their lives" led the Court to conclude that they had been denied due process by the failure to allow them reasonable time to seek counsel. *Id.* at 71.

20. 372 U.S. 335 (1963).

21. It has been remarked that when someone behaves badly towards us, we say, "You can't do that; after all, I'm human." And when we behave badly towards someone and are caught at it, we excuse ourselves by saying, "After all, I'm only human."

Human fallibility is at the core of the argument of *Capital Punishment*. With so much responsibility—more, we should admit, than we can handle—we should not volunteer to decide which persons will live and which die. The errors that Professor Black details are perfectly human. It is because they are so human that they are not correctable. It is a cliché by now that while one is entitled to a fair trial, no one can demand a perfect trial. But I assume that an isolatable flaw is intolerable, whether or not its removal

Justice Harlan recognized the distinctive due process demands of the penalty:

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case.²²

Perhaps a further concept lends support to the idea that a higher constitutional burden is imposed on the state when it wishes to take life. This, one may call the notion of 'fit.' After conviction, the criminal process tries to fit its remedies to the individual. It is the barest illusion that, prior to this, inappropriate judgments are sure to be corrected by decisionmakers farther along in the process who are called upon to make determinations with essentially the same information and faculties.

The entire process of post-conviction decisions as to an assignment to prison rather than a probationary term, the length of incarceration, the type of prison: this process is an effort to fit the convicted criminal. Similarly, what the man in prison is assigned to do, where and how he is to live and, if released, on what conditions he may remain free: these also are efforts, perhaps clumsy ones, at achieving a proper fit to the offender's character as well as to the category of his crime. The capital penalty destroys all this by obviating it.

Even assuming that a state could constitutionally do away with such attempts to fit a punishment for all its prisoners, what kind of process should we require when a state chooses to omit fitting in the case of only *some* prisoners? Apart entirely from death's cruelty, and the cruelty to the living, the operation of law in the capital context seems to undermine Law's operation itself.

brings us nearer perfection. Like assumptions have provided the impetus by which procedural due process has developed.

It somewhat misses the point to say that the discretionary stages of condemning a man to death are "in reality, safeguards." This kind of argument is often advanced to justify existing procedures; it is persuasive only to the extent that one ignores the capital context in which the decision is made, in which safeguards become death warrants, a context from which "correction" has been removed. To say that discretion, with its flaws, is a 'safeguard' is simply to say that the administration of like penalties without discretionary decisionmaking would be worse. This proves rather little; it is admitted that any striking down of the death penalty on the grounds suggested by Professor Black's essay would equally undo mandatory penalties.

It is bewildering to hear the claim that discretion is equally useful and saving in every punishment decision. Rather than answering the argument of *Capital Punishment*, such assertions beg its accusing question.

22. Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring).

The Role of the Court

The question which must determine the ultimate handling by the Court of legislative proposals to reinstitute the death penalty turns on the proper institutional role of the Supreme Court as constitutional arbiter. All of the dissenting opinions in *Furman* make the point that it is not the job of the Court to impress personal preferences on the review of state legislation.²³ This is a strong point in an Eighth Amendment challenge; much of *Furman's* majority consists of policy judgments of the type usually associated with legislative decision.

Professor Black's argument, however, seems less vulnerable to this criticism. As a strictly Due Process argument, which I take it to be, Black is putting the institutional question in this framework: If the once complementary commands of the Framers are seen as in conflict, what institution should resolve them?²⁴ If experienced attention to the system of criminal judgment convinces us that, with regard to capital penalties, mistake and arbitrariness are inherent in our processes, isn't the Court the proper body to decide when the due process clause commands more? It is by now a commonplace that the mandates of the due process clause were "not frozen as of . . . 1868."²⁵ It is not that *attitudes* have changed in the interim, although they surely have, but that our insight into our own system has changed, particularly with regard to the warping effect of the capital penalty on that system. The *process that actually occurs* prior to an execution is illuminated for us today as it was not for our forefathers.

The North Carolina case²⁶ now before the Supreme Court, sched-

23. *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting); *id.* at 410-11 (Blackmun, J., dissenting); *id.* at 431-33 (Powell, J., dissenting); *id.* at 466-70 (Rehnquist, J., dissenting).

24. The "complementary" commands are the requirements of due process in the Fifth and Fourteenth Amendments and the references to the existence (and therefore presumably the permissibility) of a capital penalty that occurs in the Fifth Amendment. See *Furman v. Georgia*, 408 U.S. 238, 283 (1972) (Brennan, J., concurring). In attempting such a resolution, Justice Frankfurter's eloquent command should be remembered.

While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. . . .

....

This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court. It must not be an exercise of whim or will. It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. . . . It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed. Such a judgment must be arrived at in a spirit of humility when it counters the judgment of the State's highest court. But, in the end, the judgment cannot be escaped—the judgment of this Court.

Sweezy v. New Hampshire, 354 U.S. 234, 266-67 (1957) (Frankfurter, J., concurring).

25. 354 U.S. at 266.

26. *Fowler v. North Carolina*, 43 U.S.L.W. 3577 (U.S. Apr. 29, 1975) (account of first oral argument).

uled for reargument this fall,²⁷ presents the capital penalty in an unusual context. In many respects the time is not right for a decision on the penalty, generally, because the North Carolina punishments were meted out by judicial fiat without resort to the legislature.²⁸ It was the effort of that state's supreme court to save its death penalty in the face of *Furman* without new legislation that led to the capital case the Court must consider. This situation might seem too fantastic to support a general review of capital punishment.

Yet the Court must also find a way to avoid the case-by-case adjudication of state decisions that is so destructive of federal comity and so burdensome to the Court's docket. The fissured decision in *Furman* was bound to mislead legislatures; indeed it is open to question whether *Furman* yielded a decision, in the sense of a guide to constitutional action for the future. A negotiated rule of the kind we have so tortuously developed in the area of obscenity would exacerbate institutional tensions. For these reasons a forthright prohibition of capital penalties, relying on a due process rationale, may be appropriate in the North Carolina case.

Conclusion

The historic debate in this society over capital punishment has principally sounded in terms of 'Repeal' and 'Reform.' The cries have been directed with varying results, in different periods, to state legislatures.

As in the antislavery movement of more than a century ago, the strategies of those wishing to abolish the capital penalty have turned, late in the struggle, to trying to achieve victories in the courts, those bodies which must, in the last analysis, administer the attacked policy. These abolitionists have achieved both little reform and, in view of the statutes passed in the wake of *Furman*, only a very temporary repeal, from the judiciary. Still, some would urge the Court to listen to these claims, moral and political.

The Due Process argument of *Capital Punishment* proposes another course: the sure application of familiar principles in a way sensitive to the characteristics of the *legal* context. Not 'Remake' but 'Recognize.'

27. See 43 U.S.L.W. 3674 (U.S. June 24, 1975).

28. See *State v. Waddell*, 282 N.C. 431, 439-46, 194 S.E.2d 19, 25-27 (1973). See also *id.* at 457, 194 S.E.2d at 33 (Bobbitt, C.J., concurring in part and dissenting in part), and discussion at 43 U.S.L.W. 3577 (U.S. Apr. 29, 1975).